

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

CHRISTINA BROWN, et al.,)	
)	
Plaintiffs)	
)	
v.)	Civil No. 90-0288 P
)	
UNITED STATES)	
OF AMERICA, et al.,)	
)	
Defendants)	

**RECOMMENDED DECISION ON DEFENDANT
UNITED STATES OF AMERICA'S MOTION TO DISMISS**

The United States of America, a defendant in the instant personal-injury action, moves to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. The United States asserts two grounds for dismissal: (1) that the entire suit against it is time-barred and (2) that any claims against it by Steven and Karen E. Brown, parents of injured plaintiff Christina Brown, are barred because never brought to the attention of the United States Navy within two years of their accrual. Finding neither contention meritorious, I recommend that the instant motion be denied.

Motions to dismiss for failure to state a claim require the court to accept all well-pleaded factual allegations in the complaint as true and to draw reasonable inferences therefrom in the plaintiff's favor. *Dartmouth Review v. Dartmouth College*, 889 F.2d 13, 16 (1st Cir. 1989). A court may grant such a motion only when ``it appears beyond doubt that the plaintiff can prove no set of facts in support of

his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (footnote omitted).

The defendant's first ground of dismissal is frivolous. The defendant correctly states that under 28 U.S.C. ' 2401(b) the plaintiffs had six months in which to file the instant action following final denial of their claims by the United States Navy. As the defendant asserts, the plaintiffs had until December 8, 1990 to file their claim in United States District Court. *See* Defendant's Memorandum in Support of Motion to Dismiss (``Defendant's Memorandum") at 3. The defendant argued in its memorandum that the plaintiffs did not ``file" their claim until February 22, 1991, the date on which the Office of the United States Attorney was served with a summons and complaint. *See id.* at 1-3. It persisted in so arguing even after plaintiffs' counsel noted in his memorandum that the instant complaint was in fact filed with the court on December 7, 1990.¹ *See* Memorandum in Opposition to Motion to Dismiss (``Plaintiffs' Memorandum") at 2. The plaintiffs' filing with this court, by the clear terms of Fed. R. Civ. P. 3, ``commenced" this action. Even after being so informed at oral argument, the defendant's counsel clung to this unsound defense, citing two cases that he asserted would prove this action nonetheless time-barred. Both cases cited are inapposite, dealing with the particularized requirements of filing and service of process when a complaint is amended to add a defendant. *See Jackson v. Seagrave Fire Apparatus, Inc.*, 660 F. Supp. 326 (D. Me. 1987); *Murray v. United States Postal Serv.*, 550 F. Supp. 1211 (D. Mass. 1982).

Turning next to the defendant's second ground for dismissal, the defendant originally argued in his memorandum that any complaints brought by Steven or Karen E. Brown were time-barred because

¹ I find inexcusable the failure of government counsel to take notice of the date of the pleadings filed in this case.

the parents had not filed separate administrative claims within two years of their cause of action in tort, as required by 28 U.S.C. ' 2401(b). *See* Defendant's Memorandum at 2. The plaintiffs' counsel contended in his memorandum, and reiterated at oral argument, that the parents merely seek to recoup medical expenditures on behalf of their injured daughter, Christina -- expenditures clearly contemplated in Christina's original claim with the Navy. *See* Plaintiffs' Memorandum at 3-4. On the basis of this representation, the defendant's counsel conceded at oral argument that such claims are properly brought.

Both grounds for dismissal having failed, I recommend DENIAL of the instant motion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. ' 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 12th day of June, 1991.

David M. Cohen
United States Magistrate Judge